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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOSEPH B., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JOSEFINA B. et al.,

Defendants and Appellants.

D049231

(Super. Ct. No. J516217)

APPEAL from a judgment of the Superior Court of San Diego County, Julia Craig
Kelety, Judge. Reversed.

Josefina B. and John B. appeal following the dispositional hearing in the
dependency case of their son, Joseph B. They contend the evidence was insufficient to

support the jurisdictional finding Joseph was a dependent under Welfare and Institutions Code section 300, subdivision (b).¹

I

BACKGROUND

On March 29, 2006, when Joseph was 15 and one-half years old, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition, alleging Joseph "had a medical disorder, including but not limited to myasthenia gravis."² It further alleged that from September 15, 2005 until the date the petition was filed, Josefina and John "failed and refused to provide" required care and treatment, resulting in Joseph's hospitalization; further, Josefina's and John's omissions included missing medical appointments, and permitting depletion of Joseph's medication because they did not obtain funding to purchase the medication.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise specified.

² Joseph's myasthenia gravis was diagnosed in 2003. At trial, Carla Grosmann, his neurologist from March 2004 to February 2006, defined myasthenia gravis as follows. "It's an immune mediated condition, meaning that the body doesn't recognize itself. And what happens is the body starts to attack [its] own muscle usually mediated by an antibody. And the antibody is affecting [its] own muscle. And then as a result of that, there is episodic weakness in different parts of the body." Dr. Grosmann testified that one of the biggest concerns with the condition is its effect on the muscles that control breathing., Linda Colombini, Joseph's pediatric pulmonologist from August 2004 through the time of trial, testified myasthenia gravis could cause less effective breathing or a cessation of breathing and Joseph suffered from vocal cord paralysis, with the vocal cords obstructing his airway. Both doctors testified myasthenia gravis could be life-threatening. Neither Dr. Grosmann nor Dr. Colombini was involved in either of Joseph's two hospitalizations at issue here.

In April 2006, Joseph was released from the hospital and detained with a maternal aunt. The jurisdictional and dispositional hearing began on July 27 and ended on August 11. The court entered a true finding on the petition, declared Joseph a dependent, and ordered him placed with Josefina and John, with family maintenance services.

On March 28, 2007, while this appeal was pending, the juvenile court terminated dependency jurisdiction. We invited counsel to file letter briefs discussing whether termination of jurisdiction made the appeal moot. The Agency's counsel requested the appeal be dismissed as moot, but counsel for Joseph, Josefina, and John asked that we address the merits. After considering the letter briefs, we conclude we should address the merits. Termination of dependency jurisdiction does not extinguish the various adverse social and economic consequences that attached to Josefina and John with the initiation of, and true finding in, this case (e.g., Pen. Code, § 11170 [Child Abuse Central Index]; Health & Saf. Code, § 1596.877 [children's day care licensing].)

II

DISCUSSION

A. Introduction

Section 300, subdivision (b) provides for a dependency when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . the willful or negligent failure of the parent . . . to provide the child with adequate . . . medical treatment The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

In the juvenile court, the Agency had the burden of proving the allegations of the petition by a preponderance of the evidence. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318; § 355, subd. (a).) On appeal, Josefina and John have the burden of showing the jurisdictional finding is unsupported by substantial evidence. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135; disapproved on another ground by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) We have no power to reassess the credibility of witnesses or resolve conflicts in the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) "If there is any substantial evidence to support the findings of the juvenile court, a reviewing court must uphold the trial court's findings. All reasonable inferences must be in support of the findings and the record must be viewed in the light most favorable to the juvenile court's order. [Citations.]' [Citation.]" (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 168.) After examining the record, we conclude the evidence is insufficient to support the jurisdictional finding under section 300, subdivision (b).

To enter a true finding on the petition, the juvenile court was required to find, by a preponderance of the evidence, that between September 15, 2005, and March 29, 2006, Josefina and John missed Joseph's medical appointments, did not have his medication because they did not obtain funding, and otherwise did not provide required medical care and treatment for him, resulting in his hospitalization. It was also required to find Joseph had suffered, or there was a substantial risk he would suffer, serious physical harm or

illness as a result of Josefina's and John's negligent³ failure to provide adequate medical treatment. This "effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur)." (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) Here, there is insufficient evidence of causation--that Joseph was hospitalized because Josefina and John did not provide him required medical care and treatment.

B. The Hospitalizations

During the six and one-half month period alleged in the petition, Joseph was hospitalized from December 26, 2005, to January 3, 2006, and from March 26 to the time the petition was filed on March 29.

1. *The December 26, 2005, to January 3, 2006 Hospitalization*

Joseph's December 26, 2005, to January 3, 2006 hospitalization was for respiratory failure, possibly caused by muscle weakness and vocal cord paralysis. Joseph was given heliox (a combination of helium and oxygen), and placed on a bi-level positive airway pressure (bipap) machine, a noninvasive method of providing breathing assistance, but he did not need to be placed on a ventilator.⁴

³ There is no suggestion their conduct was willful.

⁴ A ventilator is a machine that enables a patient to breathe. Mechanical ventilation entails inserting a tube through the mouth or nose and connecting it to a ventilator.

This hospitalization was preceded by two missed doses of the medication Mestinon, prescribed by Dr. Grosmann for Joseph's myasthenia gravis; only a few hours of sleep over a two-day period during the Christmas holiday; being outside in the cold without sufficient clothing; weight loss; and fatigue. Joseph missed the two doses because he could not swallow. He testified that as soon as he told Josefina he was having trouble swallowing and breathing, she took him to the hospital.

The admitting physician, apparently not a pulmonologist or a specialist in myasthenia gravis, believed that missing the doses exacerbated Joseph's condition. Dr. Colombini, a pulmonologist but not an expert on myasthenia gravis, believed that "missing Mestinon is a factor in possibly exacerbating the myasthenia gravis." She did not know if there was an investigation into whether Joseph had a cold, an upper respiratory infection, or secretions in his throat, which could cause respiratory distress. Although it was standard practice to note such conditions, a mild cold might not be noted. Dr. Colombini also testified that Joseph's vocal cord paralysis was likely a cause of his hospitalizations for respiratory distress. She could not say that Josefina and John caused the problem leading to the hospitalization. Dr. Grosmann, an expert on myasthenia gravis, was unable to say how a missed dose of Mestinon would have affected Joseph and did not express an opinion whether Josefina and John did anything to cause the hospitalization. She testified that even if Joseph followed his prescribed regimen perfectly, he might nevertheless require hospitalization. Sung Min Park, the pulmonologist who treated Joseph during this hospitalization, believed his poor weight

gain was possibly "at least partly due to increased work of breathing." None of the doctors said Josefina and John were responsible for Joseph's weight loss.

2. The March 26, 2006 Hospitalization

By the March 26, 2006 hospitalization, Joseph had gained weight while in Josefina and John's care. When admitted to the hospital, he showed signs of respiratory failure. He was intubated and placed on a ventilator.

The Agency social worker testified that Josefina admitted she had forgotten to give Joseph his bedtime dose of Mestinon. Joseph testified he missed the dose because he was having trouble swallowing. When he told Josefina he was having trouble swallowing, she took him to the hospital immediately. No pulmonologist was involved in this hospitalization. The admitting physician concluded "the only obvious precipitant" was Joseph's failure to take his evening dose of Mestinon. Dr. Grosmann did not know the cause of the hospitalization. As noted above, she testified that Joseph might require hospitalization even if he took all of his medication, and Dr. Colombini testified that Joseph's vocal cord paralysis was likely a cause of his hospitalizations for respiratory distress.

3. Other Hospitalizations

Before the time span alleged in the petition, Joseph was hospitalized several times. The first hospitalization occurred some time before March 2004. He was hospitalized in May for a thymectomy. He was hospitalized from April 22 to 30, 2005 for airway and respiratory problems.

After the time span alleged in the petition, Joseph was hospitalized three times in a period of approximately two and one-half months. He was hospitalized from May 14 to 16, 2006, for respiratory distress, from July 9 to 12 for respiratory failure, and from July 29 to 31 for respiratory distress.

Before the May 2006 hospitalization, there were no missed medication doses. During this hospitalization, Joseph "received a small amount of blow-by oxygen," but no intubation, bipap, or heliox (a combination of helium and oxygen).

The July 9 to 12, 2006 hospitalization was preceded by, and possibly caused by, a missed dose of Mestinon. Joseph apparently missed the dose because his caretakers were afraid he could not tolerate the medication considering his inspiratory strider, a noise caused by inhaling through a narrowed airway. Dr. Colombini believed that Joseph's condition was probably exacerbated by his vocal cord paralysis and that the caretakers should have attempted to give him the medication. During this hospitalization, Joseph was in pediatric intensive care, where he received "100 percent oxygen" (different from blow-by oxygen) and heliox; he did not require bipap or ventilation.

The admitting physician for the July 29 to 31, 2006 hospitalization believed that Joseph "awoke with some retained secretions," which increased the effort needed to breathe, exacerbating his vocal cord paralysis and narrowing his airway, which in turn led to increased distress, effort, and obstruction. During this hospitalization, Joseph was treated with four medications. His symptoms improved rapidly.

C. Medical Appointments

Joseph received medical care at a muscle disease clinic; an ear, nose, and throat (ENT) clinic; and a gastroenterology clinic. In September 2005, he had appointments at the muscle disease clinic and with his primary care physician, Dr. Quintero. In October, he had an appointment at the muscle disease clinic. He apparently had at least one medical appointment in November and another appointment in December. He had an appointment at the muscle disease clinic in January 2006 but missed an appointment at the gastroenterology clinic that month. He had an appointment at the muscle disease clinic in February but missed an ENT appointment that month. He had an appointment with Dr. Quintero in March but missed an appointment at the gastroenterology clinic that month. By the time of the March appointment with Dr. Quintero, Joseph's weight had increased.

Joseph said that Josefina was always willing to take him to appointments. She did not drive, however, and he missed some of his appointments because he did not want to take the three-hour bus ride to the clinic. Dr. Grosmann testified that it was acceptable for Joseph to see another doctor, such as his primary care physician, who would then call Dr. Grosmann with a report. During the period alleged in the petition, September 15, 2005, until March 29, 2006, Joseph saw a physician at least once a month.

D. Funding for Medication

The evidence is insufficient to establish that not taking his medication caused Joseph to be hospitalized. Furthermore, at the time of the hearing, the cost of his medications were fully covered by Medi-Cal.

E. Conclusion

Neither Dr. Colombini, the pulmonologist, nor Dr. Grosmann, the expert on myasthenia gravis, could say that Josefina and John were responsible for Joseph's hospitalizations. Dr. Grosmann testified that even if Joseph took all of his prescribed medication, he might still require hospitalization. Dr. Colombini testified that Joseph's vocal cord paralysis was likely a cause of his hospitalizations. Joseph was also hospitalized after he was detained. Although admittedly the treatment he required during those hospitalizations was less intensive, there were three post-detention hospitalizations in a period of only about two and one-half months. Finally, during the period alleged in the petition, Joseph was examined by a physician at least once a month. The evidence summarized above does not establish a causal link between any act or omission by Josefina or John and the hospitalizations alleged in the petition.

DISPOSITION

The judgment is reversed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.